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JUN 22 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WILLIAM D. PHILLIPS
(202) 835-8153

EX PARTE OR LATE FILED

June 22, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation — PP Docket No. 93-253

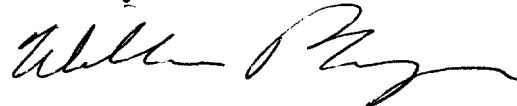
Dear Mr. Caton:

On June 15, 1994 Cook Inlet Region, Inc. ("CIRI") made an oral ex parte presentation to The Honorable Reed E. Hundt, The Honorable Andrew C. Barrett, The Honorable Susan Ness, The Honorable William D. Kennard, Janet Mago, and Lauren Belvin in the captioned proceeding. On June 22, 1994 CIRI submitted to the same individuals the attached written ex parte presentation, the substance of which is the same as that of the oral presentation.

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, two copies of this letter and corresponding attachments are being filed.

If any questions arise, please contact the undersigned.

Sincerely,



William D. Phillips

enclosures

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COOK INLET REGION, INC.

June 21, 1994

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

Our outline also details our views that strong anti-sham protection is also needed. We have enclosed an article from the June 20th Forbes which may also be of interest to you.

Again, Mr. Chairman, thank you for your consideration and interest in Cook Inlet.

With best regards,

Cordially,
COPY

Roy Huhndorf
President

940291-1

COOK INLET REGION, INC.

June 21, 1994

The Honorable Andrew C. Barrett
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Commissioner Barrett:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

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With best regards,

Cordially,
COPY

Roy Huhndorf
President

Q40291-1

COOK INLET REGION, INC.

June 21, 1994

The Honorable Susan Ness
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Commissioner Ness:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

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Again, thank you for your consideration and interest in Cook Inlet.

With best regards,

Cordially,

COPY
Roy Huhndorf
President

Q40291-1

COOK INLET REGION, INC.

June 21, 1994

Janet Mago, Esquire
Senior Counsel
Office of the Honorable Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Ms. Mago:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

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Again, thank you for your consideration and interest in Cook Inlet.

With best regards,

Cordially,
COPY

Roy Huhndorf
President

Q40291-1

COOK INLET REGION, INC.

June 21, 1994

Ms. Lauren ("Pete") Belvin
Office of the Honorable James H. Quello
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Ms. Belvin:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

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Again, thank you for your consideration and interest in Cook Inlet.

With best regards,

Cordially,
COPY
Roy Huhndorf
President

Q40291-1

COOK INLET REGION, INC.

June 21, 1994

William E. Kennard, Esquire
General Counsel
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Kennard:

Thank you again for meeting with me to discuss Cook Inlet Communication, Inc. and our interest in the PCS proceeding. As you requested, enclosed is an outline of our views on the issues related to small and minority business participation in the broadband PCS auction.

We are especially interested in the opportunity to participate in the two (A & B) MTA blocks that will be offered. We have suggested to you a plan that would allow for both bidding credits for designated entities and installment payments for small businesses in the MTA blocks. Installment-payment eligibility is of special interest to Cook Inlet in the MTA blocks and we have suggested reduced levels for bidding credits in those two blocks simply to reduce the overall cost of such a program.

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Again, thank you for your consideration and interest in Cook Inlet.

With best regards,

Cordially,

COPY

Roy Huhndorf
President

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RECOMMENDATIONS OF COOK INLET COMMUNICATIONS

- The "C" (30 Mhz - BTA) Blocks should be organized as follows:
 - Open to bidding only by "Entrepreneurs"
 - Defined as
 - (1) Annual gross revenues in any one of last five years not above \$100 million, and
 - (2) Annual net income in any one of last five years not above \$30 million, and
 - (3) Total net equity not above \$50 million, and
 - (4) Not more than 200 employees.
 - Designated Entity Preferences among Entrepreneurs:
 - Disadvantaged Minorities and Disadvantaged Women = 25% bidding credit each
 - "Disadvantaged" defined by reference to SBA-type test (see attached)
 - Disadvantaged Minority Women cumulate bidding credits to 40%
 - Small businesses get installment payments
 - "Small" defined as race and gender neutral.
 - (1) Annual gross revenues in any one of last five years not above \$50 million, and
 - (2) Annual net income in any one of last five years not above \$10 million, and
 - (3) Total net equity not above \$25 million, and
 - (4) Not more than 100 employees.
- All of the above should be governed by Affiliation rules as previously proposed by the Commission [Second Report and Order at ¶ 272, citing 13 C.F.R § 121.401 (SBA)] (includes Indian tribal rules at .401 a(3)(b))

- The "A" and "B" Blocks should be open to limited Designated Entity Preferences as follows:
 - Disadvantaged Minorities and Disadvantaged Women = 15% bidding credit each
 - Cumulate to 25%
 - Smalls get installment payments
 - There is no constitutional issue with regard to "smalls" (defined on a race and gender neutral basis) bringing their install payment preference to the "A" and "B" blocks. There also is no legislative or policy basis for limiting "smalls" to just the "C" block. The market and bid deposits will naturally determine the level of participation.
- Anti-Sham Measures
 - Substantive standards of de jure and de facto control and 51% ownership on fully-diluted basis
 - Full Disclosure Applications
 - Compliance with affiliation rules
 - Disclosure of fully-diluted equity interests
 - Disclosure of puts, calls, options and similar devices
 - Disclosure of debt covenants
 - SEC Standards of material misstatement or omission
 - Penalty of forfeiture of license
 - Penalty of criminal sanctions
 - 6-person FCC audit team assigned to spot audit and refer potential infractions to Department of Justice
 - Counsel certification for any entity filing bid deposit over \$5 million

How a big publishing company cashed in on a program intended to benefit so-called minorities. Just one more incident in the continuing folly of affirmative action.

Social engineering

By Howard Rudnitsky

DONALDSON, LUFKIN & JENRETTE'S leveraged buyout fund cashed in big last month when it agreed to sell four TV stations to Ronald Perelman's New World Communications. DLJ owned the stations for less than a year. Selling price, \$717 million. The DLJ fund and a few other investors stand to reap a fat \$350 million in profit on a \$50 million equity investment.

Faces were a bit red at Times Mirror Corp., which sold the stations to DLJ so cheaply. But Times Mirror fared better than the bare prices indicated. The publishing company got itself a nice tax break in the sale. Why? Because a minority tax certificate was involved.

A what? Sixteen years ago Congress decided that so-called minorities ought to own more broadcast stations. Voilà! Section 1071 of the tax code now provides for a deferral of capital gains taxes for a seller of media properties if he sells to an ethnic minority investor. The conditions: that the ethnic minority investor have majority equity ownership or voting control, and that he hold the property for at least a year. Who qualifies as an ethnic minority? Anyone who claims he's a Hispanic, a black, an Asian or an American Indian is entitled to the benefit unless challenged. If challenged, he has to show that at least one parent is a member of a minority group.

There have been hundreds of tax certificate deals since the program went into effect, providing non-minority investors and corporations like Times Mirror with at least \$700 million in tax benefits.

With that kind of money involved, "minority" ownership of broadcast properties must have soared, right? Wrong. Minority ownership of radio, TV and cable has increased by less than two percentage points—it's now close to 3%—since the program's inception (*FORBES*, May 15, 1989).

Take a close look at the DLJ/Argyle deal for clues as to why social engi-

neering rarely does what it sets out to do. The DLJ group completed buying the four stations in January 1994 from Times Mirror. They granted the publisher warrants, and paid \$322 million, but the common stock portion of the deal was only \$300,000. Who was the highly leveraged investor? Ibrahim Morales, a naturalized Cuban refugee and thus a Hispanic. He put up \$153,000—\$123,000 of that reportedly borrowed—giving him 51% of the stock. So, on a margin of about 10,000-to-1, he was the lucky man in control. And Times Mirror not only sold out at a profit but reaped a tax benefit valued at well over \$50 million.

As part of the deal, DLJ's partners and a group headed by Bob Marbut, former president of Harte-Hanks Communications, put up \$49.7 million for convertible preferred stock. When they convert that into common next year, they will own about 96% of the common equity and Ibrahim will not control much of anything.

Having served his purpose, Sr. Morales can step aside—or, if the new owners agree, he can stay on. In either case, he will have at least \$2 million in cash from the sale of his equity. The sum total of the deal would seem to be that it cost the U.S. Treasury \$50 million to put \$2 million into Ibrahim Morales' bank account.



PROPOSED FCC REGULATIONS

§ 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: African Americans; Hispanic Americans; American Indians/Alaska Natives; Asian Americans/Pacific Islanders [See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC Rcd 979 (1978).]

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. The FCC will entertain any relevant evidence in assessing this element of an applicant's case. The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(i) *Education.* The FCC shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) *Employment.* The FCC shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(iii) *Business history.* The FCC shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

§ 2 Economic disadvantage.

(a) *Economically disadvantaged Individuals.* (1) Economically disadvantaged individuals are socially disadvantaged individuals or women whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage the FCC may compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(2) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals or women who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or having overcome impediments to obtaining access to financing, markets and resources.

(3) For economic disadvantage as it relates to tribally-owned concerns, see § 3(a)(2).

(b) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual or woman, the FCC will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the

financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(1) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. An individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged.

(i)(A) Except as provided in paragraph (b)(1)(i)(B) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of the FCC application will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(B) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (b)(1)(i)(A) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage. For a concern where both spouses are individuals upon whom eligibility is based, the personal net worth of each spouse individually will be considered.

(2) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, the FCC's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

(3) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, the FCC shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

§ 3 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* Indian tribes are considered socially and economically disadvantaged for purposes of participation according to the following criteria:

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 4 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* With the exception of Alaska Native Corporations (see § 3(e)(2)), the Indian tribe must demonstrate to the FCC that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process -- forms and documents required.* In order to establish tribal eligibility, the Indian tribe must submit the forms and documents required of applicants generally as well as the following material.

(i) A copy of the tribe's governing document(s) such as its constitution or business charter.

§ 4 Definitions.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes, in the absence of proof of a minimum blood quantum, any citizen who is regarded as an Alaska Native.

Alaska Native Corporation means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, as defined in this section, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which such tribe, band, nation, group, or community resides. See, definition of "tribally-owned concern."

~~13 CFR Chapter 1 (1-1-93 Edition)~~ **PROPOSED FCC REGULATIONS**

§ 124.105 § 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § ~~124.112(a)~~ 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: ~~Black African~~ Americans; Hispanic Americans; ~~Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. American Indians/Alaska Natives; Asian Americans/Pacific Islanders. [See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978).]~~

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if ~~SBA~~ the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* ~~(1)~~ An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

~~(i)~~(1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

~~(ii)~~(2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

~~(iii)~~(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

~~(iv)~~(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

~~(v)~~(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. ~~SBA~~ The FCC will entertain any relevant evidence in assessing this element of an applicant's case. ~~SBA~~ The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant:

~~(A)~~(i) *Education.* ~~SBA~~ The FCC shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

~~(B)~~(ii) *Employment.* ~~SBA~~ The FCC shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

~~(C)~~(iii) *Business history.* ~~SBA~~ The FCC shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

~~(D) Socially disadvantaged group inclusion — (1) General. Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.~~

~~(2) Standards to be applied. In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:~~

~~(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;~~

~~(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and~~

~~(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.~~

~~(3) Procedure. Once a notice is published under paragraph (d)(1) of this section, SBA shall adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.~~

~~(4) Decision. Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (3) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the FEDERAL REGISTER. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.~~

§ 124.106 2 Economic disadvantage.

~~(a) Economic disadvantage for the 8(a) program. (1)(i) For purposes of the 8(a) program, economically Economically disadvantaged Individuals. (1) Economically disadvantaged individuals are socially disadvantaged individuals or women whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage ~~for purposes of 8(a) program eligibility, SBA shall~~ the FCC may compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.~~

~~(ii)(2)~~ This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals or women who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or having overcome impediments to obtaining access to financing, markets and resources.

~~(iii)(3)~~ (3) For economic disadvantage as it relates to tribally-owned concerns, see § ~~124.112(b)(2)~~ 3(a)(2).

~~(2)(b)~~ (b) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual or woman, ~~SBA the FCC~~ will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

~~(i)(1)~~ (1) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. ~~Subject to the exclusion set forth in paragraph (a)(2)(i)(B) of this section, an~~ An individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged ~~for purposes of 8(a) program entry. For personal net worth thresholds relating to continued 8(a) program eligibility, see § 124.111(a).~~

~~(A)(1)(i)(A)~~ (A)(1)(i)(A) Except as provided in paragraph ~~(a)(2)(A)(2)~~ (b)(1)(i)(B) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States (~~e.g. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin~~) must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of the FCC application ~~to the 8(a) program~~ will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

~~(2)(B)~~ (B) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph ~~(a)(2)(i)(A)(1)(b)(1)(i)(A)~~ (b)(1)(i)(A) of this section, relating to the separate financial statements, applies only to determinations of economic

disadvantage for purposes of 8(a) program entry. For a concern where both spouses are individuals upon whom program eligibility is based, the personal net worth of each spouse individually will be considered for program certification and for program eligibility.

~~(B) Whenever SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA shall exclude the individual's ownership interest in the applicant or participating 8(a) concern and the equity in his/her primary personal residence, but shall not exclude any portion of such equity in his/her primary residence which is attributable to excessive withdrawals from the applicant or participating 8(a) concern.~~

~~(C) Whenever SBA calculates the personal net worth of an individual claiming to be an Alaska Native, as defined in § 124.100, for purposes of qualifying an individually owned 8(a) applicant concern, SBA shall include assets and income from sources other than an Alaska Native Corporation, as defined in § 124.100, and shall exclude from such calculation any of the following which the individual receives from any Alaska Native Corporation:~~

~~(1) Cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;~~

~~(2) Stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);~~

~~(3) A partnership interest;~~

~~(4) Land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and~~

~~(5) An interest in settlement trust.~~

~~(ii)~~(2) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, ~~SBA's~~ the FCC's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

~~(iii)~~(3) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, ~~SBA~~ the FCC shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

~~(b) Economic disadvantage for the 8(d) Subcontracting Program, Small Disadvantaged Business Set Asides, Small Disadvantaged Business Evaluation Preferences and for any other Federal procurement programs requiring SBA's determination of disadvantaged status. (1) For purposes of the section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and whose diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for the section 8(d) Subcontracting program, Small Disadvantaged Business set asides and Small Disadvantaged Business Evaluation preferences, SBA will consider the factors set forth in paragraph (a) of this section but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach corresponds to the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.~~

~~(2) An individual whose personal net worth exceeds \$750,000 as calculated pursuant to paragraph (a)(2)(i) of this section, will not be considered economically disadvantaged for purposes of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or any Federal procurement program which uses section 8(d) for its definition of economic disadvantage.~~

§ 124.112 3 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* ~~Small business concerns owned by Indian tribes are eligible for participation in the section 8(a) program, provided that certain conditions are met as described below. The term "Indian tribe" is defined in § 124.100.~~

~~(2) Small business concerns owned and controlled by Indian tribes are generally considered socially and economically disadvantaged for purposes of participation according to the following criteria: in programs authorized by section 8(d) of the Small Business Act, section 1207(a) of the Defense Authorization Act of 1987 and any other program, which requires social and economic disadvantaged status as a condition of eligibility. If the disadvantaged status of a tribally owned concern is challenged under subpart B of this part, SBA will evaluate the concern's disadvantaged status using the criteria set forth in this section.~~

~~(3) Small business concerns owned and controlled by Alaska Native Corporations (ANCs) are eligible for participation in the 8(a) program, subject to the same conditions as apply to tribally owned concerns which are described at paragraphs (b) through (e)~~

~~of this section, with the following exceptions which apply solely to ANC owned concerns:~~

~~(i) In evaluating the economic disadvantage of the ANC, no consideration shall be given to assets or income derived from distributions of the Alaska Native Fund established by the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, et seq. Such assets and income should be included and specifically identified on the ANC's financial statements.~~

~~(ii) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).~~

~~(iii) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC for purposes of program eligibility so as to satisfy paragraph (c)(3) of this section where the majority of stock or other ownership interest is held by the ANC and holders of its settlement common stock. Both a majority of the total equity and total voting power must be so held.~~

~~(iv) Paragraphs (b)(3) and (ii) of this section are not generally applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation and by laws. Additionally, paragraph (c)(1) of this section is not applicable to the ANC owned concern to the extent it requires an express waiver of sovereign immunity or a "sue and be sued" clause.~~

~~(v) The Alaska Native Claims Settlement Act provides that a concern minority owned by an ANC shall be deemed to be both owned controlled by such ANC. Therefore, an individual responsible for control and management of an ANC owned 8(a) applicant or Participant need not establish personal social and economic disadvantage.~~

~~(b) Tribal eligibility. In order to qualify a concern which it owns and controls for participation in the 8(a) program, an Indian tribe itself must meet the conditions set forth in paragraphs (b)(1) and (b)(2) of this section. Once an Indian tribe has so established its disadvantaged status, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) Program Participation, unless specifically required to do so by the AA/MSB&COD or his/her designee. The AA/MSB&COD, or designee, may require proof of tribal eligibility during the Program Participation of any tribally owned business or at any time during the processing of an 8(a) program application from a tribally owned concern. However, nothing in this paragraph affects the requirement that each tribally owned concern seeking to be certified for 8(a) Program Participation comply with the provisions of paragraph (c) of this section.~~

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § ~~124.100~~ 4 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* ~~In order to be eligible to participate in the 8(a) Program~~ With the exception of Alaska Native Corporations (see § 3(e)(2)), the Indian tribe must demonstrate to ~~SBA~~ the FCC that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process -- forms and documents required.* ~~Except as provided in paragraph (a)(3)(iv) of this section, in~~ In order to establish tribal eligibility ~~to qualify for the 8(a) program~~, the Indian tribe must submit the forms and documents required of ~~8(a)~~ applicants generally as well as the following material.

(i) A copy of the tribe's governing document(s) such as its constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph ~~(b)(2)~~ (a)(2) of this section.

~~(c) Business eligibility. In order to be eligible to participate in the 8(a) program, a concern which is owned by an eligible Indian tribe must meet the conditions set forth in paragraphs (c)(1) through (c)(6) of this section.~~

~~(1)(b)~~ Legal business entity organized for profit and susceptible to suit. The applicant or participating concern must be a separate and distinct legal entity organized

or chartered by the tribe, or Federal or state authorities. ~~Except as provided in paragraph (a)(3)(iv) of this section, the~~ The concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's the FCC's programs, including, but not limited to, ~~8(a) Program Participation~~ loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

~~(2) Size. (i) A tribally owned applicant concern must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the tribe will not, in and of itself, cause affiliation with the tribe or with other entities owned by the tribe. However, affiliation with other tribally owned entities may be caused by circumstances other than common tribal ownership. (See part 121 of this title regarding affiliation.)~~

~~(ii) Except as provided in paragraph (c)(2)(iii) of this section, a tribally owned Program Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.~~

~~(iii) During its Program Term, a tribally owned Program Participant may, for up to two 8(a) contracts, be a party to a joint venture which exceeds the applicable size standard, if the joint venture is:~~

~~(A) 51 percent or more owned and controlled by the tribally owned Participant;~~

~~(B) Is located on the tribe's reservation or land owned by such tribe;~~

~~(C) Performs most of its activities on such reservation or tribally owned land; and~~

~~(D) Employs members of the tribe for at least 50 percent of its total workforce.~~

~~(3)(c) Ownership.~~ For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

~~No Indian tribe shall own more than one current or former 8(a) Program Participant having the same primary industry classification. Tribally owned Program Participants are subject to the provisions of paragraphs (g) and (h) of § 124.103 relating to ownership by nondisadvantaged individuals and non 8(a) concerns.~~

~~(4)(d) Control and management. (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe, who does not manage and control more than one other tribally owned 8(a) Program~~

~~Participant. In addition, such manager(s) must be found to possess the requisite management or technical capabilities as determined by SBA. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.~~

~~(ii) Members of the tribal council shall not participate in the daily management or on the board of directors of any tribally owned 8(a) concern without obtaining prior written approval for such participation from SBA.~~

~~(iii) Except as permitted by paragraph (c)(4)(i) of this section, members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.~~

~~(5) Location and economic benefit. The primary economic benefits from the concern must accrue to the tribe. A concern located on a designated Indian reservation or on tribally owned land will be presumed to provide an economic benefit, such as employment, to the tribal community. SBA may approve a location not on tribally owned land, if the applicant concern can demonstrate that similar economic benefits will accrue to the tribal community.~~

~~(6) Potential for success. (i) SBA will approve a tribally owned concern, including a concern owned by an Alaska Native Corporation (ANC), for 8(a) Program participation only when it finds that:~~

~~(a) Either the applicant concern has been in business in its primary industry classification for two full years or a waiver is granted pursuant to paragraph (c)(6)(ii); and~~

~~(B) The concern meets the requirements of paragraph (c)(6)(iii) regarding potential success.~~

~~(ii) The AA/MSB&COD will waive the two year in business requirement for a tribally owned concern if he/she finds that the concern has a marketing and develop strategy for meeting the 8(a) program competitive business mix requirements of § 124.312 without undue dependence on one or more contracts anticipated to be awarded under 8(a) program authority.~~

~~(iii) In determining whether a tribally owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:~~

~~(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operations of the tribally owned concern;~~

~~(B) The financial capacity of the tribally owned concern; and~~